

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, :
Appellee :
:
v. : No. 15-4057
:
BRIAN DAVID HILL :
Appellant :

MOTION TO DISMISS APPEAL

COMES NOW the United States of America, by and through Ripley Rand, United States Attorney for the Middle District of North Carolina, through his assistant, Anand P. Ramaswamy, to file this Motion to Dismiss Appeal. The Appellant has failed to give notice of appeal within the time limits set out in Fed.R.App.P. 4(b)(1)(A). The Appellant has failed to give notice of appeal within fourteen days of the entry of judgment, and has entered his filing beyond the extension of time available pursuant to Fed.R.App.P. 4(b)(4) (Thirty day extension available for good cause or excusable neglect). Therefore, the government submits the appeal should be dismissed. The government also respectfully requests that any briefing order(s) in this case be suspended pending the Court's ruling on this Motion.

SUMMARY OF RELEVANT FACTS

Defendant Brian David Hill ("Hill") was indicted by a federal grand jury in the Middle District of North Carolina on November 25, 2013, for one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(b) and (b)(2). (ECF Docket#1 in Case 1:13CR435-1). On June 10, 2014, Hill entered a plea of guilty to Count One of the Indictment.(ECF Docket#20, Docket entry on 6/10/14). When the case was called for sentencing on September 30, 2014, Hill's attorney was allowed to withdraw as Hill's counsel, a new attorney was appointed, and the sentencing date was continued. On November 10, 2014, Hill was sentenced to 10 months and 20 days imprisonment, but not less than time served. (Docket Entry dated 11/10/14). Judgment was entered on November 12, 2014. (Docket Entry no. 54). In a pro se motion dated January 12, 2014 and docketed January 15, 2014, Hill requested that the district court extend the time in which an appeal could be filed, and Hill included a notice of appeal. (ECF Docket#55). The district court denied Hill's motion to extend the time to file appeal, in an order filed on January 16, 2014. (ECF Docket#57). The district court noted in that order that Hill had been advised at sentencing that Hill had 14 days within the entry of the written judgment to file notice of appeal, and that the farthest that the court could extend the filing date would be December 29, 2014. ((ECF Docket#57)).

ARGUMENT

Fed. R. App. P. 4(b)(1)(A)(i) provides that a defendant's notice of appeal in a criminal case must be filed within fourteen days of the entry of the judgment. Further, Fed. R. App. P. 4(b)(4) provides that, upon a finding of excusable neglect or good cause, the district court may extend the time limit up to an additional 30 days. Therefore, added together, the maximum period allowable is 44 days.

Appeal periods are not jurisdictional in criminal cases, but are court-prescribed "claims-processing rules" that do not affect this court's subject matter jurisdiction. *See Rice v. Rivera*, 617 F.3d 802, 810 (4th Cir.2010) (stating that non-statutory claim-processing rules are not jurisdictional); *United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir.2009) ("[T]he non-statutory time limits in Appellate Rule 4(b) do not affect subject matter jurisdiction."). The time bar in Rule 4(b) must be enforced when properly invoked by the government. *United States v. Mitchell*, 518 F.3d 740, 744, 750 (10th Cir.2008). Here, Defendant Hill's judgment was entered on November 12, 2014. His pro se notice of appeal was mailed on January 12, 2014, which was 61 calendar days after the judgment was entered. As the district court noted, even if the maximum extension had been granted and allowing for a holiday not counted, Defendant's appeal is still 14 days late. Thus, his notice of appeal was filed beyond the maximum period allowable. Because Defendant failed to file a timely notice of appeal, the government contends

that the appeal should be dismissed as untimely under Rule 4(b).

CONCLUSION

The United States respectfully submits that Defendant's appeal should be dismissed as untimely. The government also respectfully requests that any briefing order(s) in this case be suspended pending the Court's ruling on this Motion. The undersigned has contacted Appellant's counsel, Mark A. Jones, who indicates he objects to the government's motion.

This the 5th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 5, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

Mark A. Jones, Esquire

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